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Supreme Court of the United States

OCTOBER TERM, 1950

No. 151

TEXAS AND NEW ORLEANS RAILROAD COMPANY,
Petitioner,

v.

FLETCHER L. YARBROUGH & COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS AT DALLAS AND SUPPORTING BRIEF.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS AT DALLAS.

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas at Dallas, which became final on the 29th day of March, 1950, upon the Supreme Court of Texas denial of this Petitioner's Motion for Rehearing on Its Application for Writ of Error.

OPINIONS BELOW

The Opinion of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas at Dallas is reported in *226 S. W. 2d 257*. The Order of March 1, 1950, of the Supreme Court of Texas denying Petitioner's Application for Writ of Error is not reported, and the Order of the

Supreme Court of Texas of March 29, 1950, denying Petitioner's Motion for Rehearing on its Application for Writ of Error is not reported.

JURISDICTION

I.

The District Court for the 44th Judicial District, Dallas County, Texas, the trial court, had jurisdiction by virtue of Article 1906 of the Revised Civil Statutes of Texas of 1925. In the trial court the federal question, by virtue of which this Court's writ of certiorari is sought, was raised by this Petitioner's pleading in its First Amended Original Answer. The manner in which it was raised was by setting up as an affirmative defense the bill of lading involved and the provisions of Section 1 of Rule 27 of Consolidated Freight Classification No. 16, Western Classification No. 71, tariff as filed with the Interstate Commerce Commission, said tariff requiring shipper to load its cotton aboard Petitioner's railroad cars; and further by this Petitioner's assertion in said answer that delivery could not be complete until there had been compliance with the tariff provision requirement.

That the trial court heard this cause on a complete stipulation of facts between the parties without any additional testimony, and that the federal question asserted by Petitioner was included in such stipulation, to-wit:

> "That at the time of the above loss and damage Section 1 of Rule 27 of Consolidated Freight Classification No. 16, Western Classification No. 71 (approved by the Interstate Commerce Commission and the Texas

Railroad Commission) was in force and read as follows:

> " 'Section 1. Owners are required to load onto or on cars freight for forwarding by rail carriers and to unload from cars freight received by rail carriers, carried at C. L. ratings or rates, except where tariff of carrier at point of origin or destination or stop-over station (as the case may be) provides for loading or unloading of C. L. freight by carrier.'
>
> "That the shipment in question was shipped on a car load rate; that no tariff of the carrier provided for loading by the carrier.
>
> "The above tariff is the tariff applicable to the shipment in question."

The trial court upheld this Petitioner's assertion that the tariff provision controlled to prevent completed delivery in its judgment for this Petitioner denying Respondent's right to recover.

II.

The Respondent herein invoked the jurisdiction of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas at Dallas in its appeal from the trial court's judgment under Article 1819, Revised Civil Statutes of Texas, 1925. In the Court of Civil Appeals in the Court's opinion, delivered by Chief Justice Bond on December 2, 1949, the Court rejected the tariff provision above quoted, and ignored its content and effect. Said Court held that the issuance of a bill of lading constituted completed delivery to the carrier, and the carrier's exercise of dominion and control of the shipment, despite the fact that the bill

of lading, as quoted in the Court's opinion, recites: "Received, subject to the classifications and tariffs in effect on the date of the issue of this Bill of Lading."

The Court of Civil Appeals reversed and rendered the trial court's judgment for this Petitioner.

In Petitioner's Motion for Rehearing in the said Court of Civil Appeals, the federal question was presented in its Assignments of Error as follows:

ASSIGNMENT OF ERROR NUMBER V.

"The Court of Civil Appeals erred in holding that the rule of completed delivery has no application to the tariff involved because the tariff specifically provides that the shipper must load the cotton onto carrier's cars, and until such loading is complete the shipper has not done everything required to give complete possession and control of the cotton to the carrier, and delivery therefore could not be completed."

ASSIGNMENT OF ERROR NUMBER VII.

"The Court of Civil Appeals erred in holding that the only way the shipper could regain dominion over the cotton was to surrender its bill of lading because the Compress Company, which was the shipper's agent, had complete dominion over the cotton so long as it was on its premises."

ASSIGNMENT OF ERROR NUMBER IX.

"The Court of Civil Appeals erred in holding that delivery does not have to be actual delivery but may be such

delivery as the parties among themselves may agree upon because the applicable tariff provided for actual loading by shipper; therefore no agreement or custom or usage among the parties could vary the terms of the tariff because the tariff has the effect of a statute."

ASSIGNMENT OF ERROR NUMBER X.

"The Court of Civil Appeals erred in completely ignoring the provisions of Section 1 of Rule 27 of the Consolidated Freight Classification No. 16 which tariff provided that the shipper must load the freight onto the cars of the carrier."

The federal question was further presented in Petitioner's argument in support of Assignments of Error, as follows:

> "The tariff involved in this interstate shipment unequivocally placed the duty of loading the cotton on the shipper. Appellee's brief contains numerous cases holding that this duty could neither be waived by express agreement of the shipper and carrier nor by custom, since the tariff involved had the effect of a statute and could not be changed, waived or modified.* * *"
>
> "The tariff in clearest terms states that the shipper or its agent must load the cotton onto the cars. The evidence is undisputed that when the cotton burned it had not been loaded onto carrier's cars. It is thus apparent that there was further action necessary on the part of the shipper before the carrier could put the cotton at once in itinere. For carrier to have agreed that delivery of the cotton had been completed under these circumstances would have been a violation of the provisions of the tariff."

The Court of Civil Appeals denied this Petitioner's Motion for Rehearing.

III.

That the federal question was preserved by this Petitioner in its Application for Writ of Error to the Supreme Court of Texas, the Supreme Court of Texas having jurisdiction of this suit under Subdivisions (2), (3), and (6) of Article 1728 of the Revised Civil Statutes of Texas, 1925.

In said Application for Writ of Error under Points of Error, this Petitioner stated as follows:

FIFTH POINT

"The error of the Court of Civil Appeals in holding that the rule of completed delivery has no application to the tariff involved because the tariff specifically provides that the shipper MUST LOAD THE COTTON ONTO CARRIER'S CARS, and until such loading is complete the shipper has not done everything required to give complete possession and control of the cotton to the carrier, and delivery therefore could not be completed."

SIXTH POINT

"The error of the Court of Civil Appeals in holding that the cotton involved here was delivered and accepted for shipment under the applicable tariff while on the compress platform because such holding is in direct conflict with THE APPLICABLE TARIFF WHICH PROVIDES FOR LOADING OF THE COTTON BY THE SHIPPER."

NINTH POINT

"The error of the Court of Civil Appeals in holding that delivery does not have to be actual delivery but may be such delivery as the parties among themselves may agree upon because the APPLICABLE TARIFF PROVIDED FOR ACTUAL LOADING BY THE SHIPPER; therefore no agreement or custom or usage among the parties could vary the terms of the tariff because the tariff has the effect of a statute."

TENTH POINT

"The error of the Court of Civil Appeals in completely ignoring the provisions of Section 1 of Rule 27 of the Consolidated Freight Classification No. 16 which tariff provided that the shipper MUST LOAD THE FREIGHT ONTO THE CARS OF THE CARRIER."

On March 1, 1950, the Supreme Court of Texas denied Petitioner's Application for Writ of Error.

IV.

Petitioner proceeded to file its Motion for Rehearing on Its Application for Writ of Error. In Grounds for Error it re-emphasized to the Court its Tenth Point quoted supra, i. e. that the Supreme Court erred in not granting error on the ground that the Court of Civil Appeals should not have ignored the provisions of the interstate tariff involved herein, thus preserving the federal question.

Further, in Petitioner's Argument in said Motion, it stated:

> "In refusing petitioner's application for writ of error this Honorable Court completely overlooked the interstate tariff which controlled the shipment of cotton in question. This tariff is set out in full on Page 7 of petitioner's Application for Writ of Error. It provides that the shipper must load the cotton onto the carrier's cars.
>
> "No court has ever held delivery to be completed prior to actual loading where there was an interstate tariff involved. The cases all recognize the effect of the tariff and hold that the loading and unloading must be done by the shipper.* * *"
>
> "* * * Neither the shipper nor the carrier could waive the provisions and terms of the federal tariff under which this cotton was shipped, as the tariff has the force and effect of a federal statute.* * *"
>
> "* * * Justice can be done by this Honorable Court by its finding that the federal tariff must be complied with and the cotton actually loaded into carrier's cars in compliance with said tariff before delivery can be completed to the carrier.
>
> "It is respectfully submitted that this Court has in its power the right and duty to remedy the wrong committed by the Court of Civil Appeals and it is the duty of this Court to apply the federal tariff involved in said shipment and come to the inescapable conclusion that there had been no actual delivery of the cotton to the carrier at the time of the fire."

On March 29, 1950, the Supreme Court of Texas entered its order denying this Petitioner's Motion for Rehearing on Its Application for Writ of Error, thus making final the Opinion and Judgment of December 2, 1949, of

the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas at Dallas.

V.

That the Supreme Court of the United States has jurisdiction under the provision of 28 U. S. C. 1257(3). This petition is filed within the time provided in 28 U. S. C. 2101(c).

QUESTION PRESENTED

Whether the provisions of a bill of lading issued on a shipment and the applicable tariff provision, both having the force and status of a federal statute, can be totally disregarded by a State Court in determining whether or not a carrier is liable for cotton destroyed by fire before it is ever in the carrier's possession.

STATUTES INVOLVED

The pertinent statutes involved are:

1. Shipper's Order Bill of Lading providing:

> "Received, subject to the classifications and tariffs in effect on the date of the issue of this Shipping Order."

2. Tariff involved is Section I of Rule 27 of the Consolidated Freight Classification No. 16, which section reads as follows:

> "Section I: Owners are required to load into or on cars freight for forwarding by rail carriers, and to unload from cars freight received by rail carriers, carried at carload ratings or rates, except where tariff or carrier at point of origin or destination or stopover

station (as the case may be) provides for loading or unloading of carload freight by carrier."

It is admitted in the Stipulation of Facts that the above-quoted tariff was applicable to the shipment in question; that no tariff of the carrier provided for loading or unloading by the carrier, and that the duty of loading by reason of the above tariff remained with the shipper.

3. Interstate Commerce Act, 49 U. S. C. Section 6(7).

STATEMENT OF THE CASE

This suit was originally brought by Fletcher L. Yarbrough & Company, respondent herein, and hereinafter referred to as "shipper" against the Texas and New Orleans Railroad Company, petitioner herein, hereinafter referred to as "carrier" for the loss of 152 bales of cotton which cotton was destroyed by fire. The case was submitted to the trial court on an agreed stipulation of facts. Shipper was the owner of 152 bales of cotton which it desired shipped from Bryan, Texas, to points in the State of Georgia. The cotton was first delivered by Shipper to the Bryan Compress and Warehouse Company at Bryan, Texas, in order that the cotton could be compressed for the shipper's convenience and made ready for shipment. After the cotton was delivered to the compress company shipper contacted carrier's agents in Bryan, Texas, and made arrangements for the shipment of the cotton to Georgia and secured bills of lading. After carrier had issued its bills of lading and before any of the cotton was actually loaded into carrier's cars, and while said cotton was still in the possession of the Bryan Compress and

Warehouse Company a fire destroyed the cotton. The fire occurred through no fault on the part of the carrier.

The above facts are more fully developed in the Stipulation between parties, and the applicable tariff provision is also quoted there.

The shipper contended in the trial court, in the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas at Dallas, and in the Supreme Court of Texas, and now contends that the carrier is liable as a common carrier for the destruction of the cotton since the fire occurred after the carrier had issued its bill of lading. The carrier has contended throughout all proceedings in the State Courts, and now contends in this application, that since the cotton was still in the possession of the Bryan Compress and Warehouse Company, and since it had not been loaded into the cars of the carrier by the shipper or its agents, as required by the applicable tariff provision, that there had been no completed delivery to the carrier and therefore its liability as a common carrier had not commenced.

The trial court held that delivery to the carrier had not been completed at the time of the fire and judgment was accordingly rendered for the carrier. The shipper appealed to the aforesaid Court of Civil Appeals where the judgment of the trial court was reversed and rendered. Subsequently, carrier's Motion for Rehearing in the Court of Civil Appeals was denied; the Supreme Court of Texas denied carrier's Application for Writ of Error and its Motion for Rehearing on such application.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Civil Appeals for the Fifth Supreme Judicial District of Texas at Dallas erred:

I.

In holding that delivery of the cotton was complete to the carrier upon issuance of its bill of lading, since the undisputed facts show the cotton was in POSSESSION OF THE COMPRESS COMPANY (shipper's agent) and had not been loaded into the car of the carrier.

II.

In holding that the shipper had surrendered dominion and control of the cotton to the carrier and the carrier had accepted such delivery and exercised its dominion and control over such cotton because undisputed facts show that the carrier had no control or dominion over such cotton BECAUSE IT WAS STILL IN THE EXCLUSIVE CUSTODY AND CONTROL OF THE COMPRESS COMPANY, the agent of the shipper.

III.

In holding that the shipper had performed all necessary acts to complete delivery to the carrier because undisputed facts show that there was the FURTHER ACT OF LOADING THE COTTON ONTO CARRIER'S CARS, WHICH ACT WAS TO BE PERFORMED BY THE SHIPPER OR ITS AGENT.

IV.

In holding that the carrier in accepting the shipment with knowledge of the arrangements for loading gave the carrier the unqualified right to put the cotton at once in itinere because the undisputed facts show that THE COTTON WAS STILL ON THE PREMISES OF THE COMPRESS AND COULD NOT BE PUT IN ITINERE UNTIL THE SHIPPER OR ITS AGENT LOADED THE COTTON ONTO CARRIER'S CARS.

V.

In holding that the rule of completed delivery has no application to the tariff involved because the tariff specifically provides that the shipper MUST LOAD THE COTTON ONTO CARRIER'S CARS, and until such loading is complete the shipper has not done everything required to give complete possession and control of the cotton to the carrier, and delivery therefore could not be completed.

VI.

In holding that the cotton involved here was delivered and accepted for shipment under the applicable tariff while on the compress platform because such holding is in direct conflict with THE APPLICABLE TARIFF WHICH PROVIDES FOR LOADING OF THE COTTON BY THE SHIPPER.

VII.

In holding that the only way the shipper could regain dominion over the cotton was to surrender its bill of lad-

ing because the Compress Company, which was the shipper's agent, had complete dominion over the cotton so long as it was on its premises.

VIII.

In holding that the bill of lading evidences title to and possession of the goods therein specified, and it erred in failing to recognize the universally established rule that where there is evidence of no delivery to the carrier such evidence does away with the presumption of delivery of possession of goods to carrier.

IX.

In holding that delivery does not have to be actual delivery but may be such delivery as the parties among themselves may agree upon because the APPLICABLE TARIFF PROVIDED FOR ACTUAL LOADING BY SHIPPER; therefore no agreement or custom or usage among the parties could vary the terms of the tariff because the tariff has the effect of a statute.

X.

In completely ignoring the provisions of Section 1 of Rule 27 of the Consolidated Freight Classification No. 16 which tariff provided that the shipper MUST LOAD THE FREIGHT ONTO THE CARS OF THE CARRIER.

The Supreme Court of Texas erred:

I.

In denying this Petitioner's Application for Writ of Error and its Motion for Rehearing after such denial, thus in effect refusing to take cognizance of a tariff having the effect of a federal statute and completely ignoring its terms.

REASONS FOR GRANTING THE WRIT

I.

The federal question involved herein was raised at every stage of the proceedings in the State Courts below (as shown under the heading "JURISDICTION", supra) but the Court of Civil Appeals and Supreme Court chose to completely ignore it and to act on non-federal grounds which were totally inadequate to support their decision.

II.

That Petitioner at all stages of the proceedings claimed immunity from Respondent's claim, such immunity being based on the above quoted tariff provision and bill of lading and the Interstate Commerce Act, all being federal statutes, and that this was denied by the Court of Civil Appeals and Supreme Court of Texas and that under *St. Louis, Iron Mountain and Southern Railway Company v. Taylor, Administratrix, 210 U. S. 281*, this Petitioner believes it is entitled to have a writ of certiorari issue.

III.

That allowing the State Court's decision to stand in its refusal to apply a tariff having the force and effect of federal law will result in a serious hindrance to effective administration of the law. That the Interstate Commerce Commission will be hindered in its enforcement of long established rulings and practices in protecting against discrimination.

IV.

Clearly, the question presented is one of importance to both shippers and carriers and in proper administration of federal law and administrative rulings, so that certainty may prevail in the application of tariff provisions.

Settlement of the question is in the public interest in that from a financial standpoint, both shippers and carriers throughout the United States may rely on published tariffs as fixing the point and time of delivery of shipments and the question of custody and responsibility therefor.

V.

The decision of the court below is believed to be erroneous and conflicting with the decision of this court in *Lowden v. Simonds-Shields-Lonsdale Grain Company, 306 U. S. 516.*

SUPPORTING BRIEF AND ARGUMENT

The State Courts of Texas have denied this Petitioner the benefit of the Interstate Commerce Act and the bill of lading and tariff provisions on file with the Interstate Commerce Commission in compliance with said Act. That the defenses urged by this Petitioner were available to it under federal law, hence a federal question is presented upon which a writ of certiorari should issue. *Illinois Steel Co. v. B. & O. R. R. Co., 320 U. S. 508*, and cases cited therein; *A. T. & S. F. Ry. Co. v. Robinson, 233 U. S. 173; Lowden v. Simonds-Shields-Lonsdale Grain Company, 306 U. S. 516.*

The record discloses that each of the 152 bales of cotton were to be shipped interstate from Texas to Georgia. Each shipment was therefore governed by the tariffs filed and published with the Interstate Commerce Commission. Under the applicable tariff the shipper was required to load the cotton into the cars furnished by the carrier and therefore delivery had not been completed to the carrier prior to the loading of the cotton. The tariff involved is Section I of Rule 27 of the Consolidated Freight Classification No. 16, which section reads as follows:

> "*Section I: Owners are required to load into or on cars freight* for forwarding by rail carriers, and to unload from cars freight received by rail carriers, carried at carload ratings or rates, except where tariff of carrier at point of origin or destination or stopover station (as the case may be) provides for loading or unloading of carload freight by carrier."

It is admitted in the stipulation of facts that the above quoted tariff was applicable to the shipment in question;

that no tariff of the carrier provided for loading or unloading by the carrier; and that the duty of loading by reason of the above tariff remained with the shipper.

ISSUANCE OF BILL OF LADING ONLY PRIMA FACIE EVIDENCE OF COMPLETED DELIVERY

It is uniformly held that the issuance by the carrier of its bill of lading creates a prima facie presumption of delivery of the goods to the carrier. The mere fact that the bill of lading has been issued, however, does not make the carrier absolutely liable. Such prima facie evidence of delivery of goods to the carrier may be rebutted by facts which actually show no delivery. In the case of *Missouri Pacific Railway v. McFadden, 154 U. S. 155*, a case likewise involving the destruction of cotton by fire while in the hands of a compress company, the Supreme Court of the United States said:

> "Whilst the authorities may differ upon the point of what constitutes delivery to a carrier, *the rule is nowhere questioned* that when delivery has not been made to the carrier, but, on the contrary, the evidence showed that the goods remained in possession of the shipper or his agent after the signing and passing of the bill of lading, the carrier is not liable as carrier under the bill."

DELIVERY IS COMPLETE TO CARRIER ONLY AFTER ALL REQUIRED ACTS ARE PERFORMED BY SHIPPER TO MAKE THE SHIPMENT AVAILABLE FOR IMMEDIATE TRANSPORTATION.

It is the carrier's position that delivery of the 152 bales of cotton could not have been complete prior to the time

the cotton was loaded into the box cars for shipment. It is undisputed that the duty of loading the cotton into the cars was placed upon the shipper by the applicable tariff.

Our Supreme Court of the United States in the case of *Hill Manufacturing Company v. New Orleans, M. & C. R. R. Co., 78 Southern 187, 248 U. S. 571, certiorari denied,* has approved the test for completed delivery as follows:

> "The test by which to determine whether or not it was delivered to the carrier for shipment is whether there was anything to be done by the shipper before the cotton was to be shipped by the railroad. *If the shipper must perform some service or do some act necessary, precedent to shipment, it would not be a delivery to the railroad as a common carrier.*"

The same test of delivery is also cited in *Hutchinson on Carriers, Vol. II, Sec. 113; W. F. Bogart & Company v. Wade, 200 S. W. 148; Charles J. Webb & Sons v. Central R. Company of New Jersey, 36 Fed. 2d 702.*

Texas courts have followed the above rule in substantially the same form. In the case of *Gulf, C. & S. F. Railway Company v. Anderson, Clayton & Company, 246 S. W. 1031,* the Supreme Court of Texas has stated the rule of completed delivery as follows:

> "The test as to whether property has been delivered to a carrier for immediate transportation is: Is there anything to be done by the shipper to effect passage of complete possession or control to the carrier? *If the shipper must perform some service or do some act necessary to give this control over the entire shipment to the carrier, there would be no delivery to it.*"

In order to have completed delivery the shipper must have done everything necessary to surrender complete con-

trol and custody of the goods to the carrier and the surrender of the control over the goods by the shipper must be such as to give the carrier the unqualified right to put them at once in itinere, and the carrier must have received them for that purpose. *Fewel v. St. Louis & S. F. Railway Company, 267 S. W. 960.*

Applying the above fundamental rules of completed delivery we find that the shipper in the case before this court has not completed delivery of the 152 bales of cotton to the carrier. In our case the shipper is required by tariff (Section I of Rule 27 of the Consolidated Freight Classification No. 16) to load the cotton into carrier's cars. Therefore, the shipper has not performed all services necessary to effect a complete possession and control in the carrier until the loading is completed. The Court of Civil Appeals clearly erred in holding that the shipper had performed all acts necessary to effect a completed delivery to the carrier since it was undisputed that the shipper was to load the cotton into the carrier's box cars.

COMPLETED DELIVERY CANNOT BE WAIVED BY CUSTOM OR USAGE

The cotton in question at the time of the fire was still on the platform of the Bryan Compress and Warehouse Company and had not been loaded by the shipper into the cars of the carrier. Such duty on the part of the shipper to load the cotton could not be changed by the parties nor waived by them, as the tariff clearly places the duty of loading the cotton upon the shipper and not the carrier. This tariff filed with the Interstate Commerce Commission

has the force and effect of a statute and cannot be waived. It is binding upon both the railway and the shipper. *Pillsbury Flour Mills Company v. Great Northern Railway, 25 Fed. 2d 66; Western Grain Company v. St. Louis-San Francisco Railway Company, 56 Fed. 2d 160; Breazeale v. American Railway Express Company, 137 So. 585; J. H. Hamlen & Son Company v. Illinois Central Railway Company, 212 Fed. 324; American Railway Express Company v. American Trust Company, 47 Fed. 2d 16; Lowden v. Simonds-Shields-Lonsdale Grain Company, 306 U. S. 516; Northern Pacific Ry. Co. v. Van Dusen Harrington Co., 60 Fed. 2d 394.* From these cases it is clearly seen that no evidence of usage or custom to show completion of delivery are admissible when such usage or custom is contrary to the statutes. It is well settled that a trade usage which is contrary to a statute is invalid and may not be invoked. *Wolfe v. Texas Company, 83 Fed. 2d 425.* It is generally stated that a custom directly opposed to the command of a statute is a custom without legal effect. *In re Strassburger, 12 Fed. Supp. 420.* Mr. Williston, in his works on *Contracts*, states the rule as follows:

> "Though usage may work such changes in the rule of law applicable to a situation as the parties themselves might have brought about had they in terms so agreed, it is a general rule that 'where the incident (which it is sought to annex by proof of usage) is of such a nature that the parties are not themselves competent to introduce it by express stipulation, no such incident can be annexed by the tacit stipulation arising from usage.' This means that if an express agreement would be either in violation of public policy or forbidden effect by law, an equivalent usage will not

help the matter." *Williston on Contracts, Volume III, Sec. 655.*

By reason of the authorities above cited, the parties involved herein could not have contracted for the carrier to load the cotton since the tariff specifically placed that duty upon the shipper. It follows that since the duty of loading the cotton was placed upon the shipper by law, the compress company necessarily must be the agent of the shipper and not the carrier in the loading of the cotton. Liability, therefore, cannot be attached to the carrier in this interstate shipment as was done in those cases in which the court found that by reason of custom and usage the compress company was agent of the carrier for the purpose of loading the cotton.

The tariff which required the shipper to load the cotton into the cars could not be waived by the carrier. The carrier could not accept the delivery of the cotton in a place different from that provided by the tariff, for to do so would be in violation of Section 6(7) of the Interstate Commerce Act. *49 U. S. C. Section 6(7).* The purpose and effect of Section 6 of the above act is to make certain that all shippers might know what a carrier's rate is for every service performed by it, thus enabling shipper to determine, among other things, whether they are being discriminated against and also to permit the commission if they are so advised to inquire into the reasonableness of such rates. A railroad engaged in interstate commerce cannot assume any additional services or burdens than those shown in its published tariffs, and assumption of any additional services imposes no duty on the carrier. Even if the parties

had made an express contract in good faith for the carrier to load the car (a special service not filed in the tariff) such agreement would not be valid. *Stevens v. Atchison T. & S. F. Railway Company, 202 N. Y. S. 195 (Affirmed, 239 N. Y. 572, 147 N. E. 200, Certiorari denied); Chicago & A. R. Company v. Kirby, 225 U. S. 155.*

For the Court of Civil Appeals to hold that delivery of the cotton in question to the carrier is complete while the cotton is still on the compress platform and before it is loaded into the cars would give the carrier complete control and custody over the goods. If this were so, the carrier and not the shipper would have the duty of loading the cotton into the cars. The tariff specifies that the shipper must load the car. If the carrier loaded the car it would be a direct violation of Section 6(7) of the Interstate Commerce Act in that it would be extending to the shipper a facility not specified in the tariff. Moreover, if the carrier had loaded the goods it would have been a rebate to the shipper just as surely as if it had paid the shipper to load the car. In the case of *Rockwell v. Grand Trunk Western Railway Company, 264 Mich. 626, 250 N. W. 515 (Mich. Supreme Court)*, the identical tariff provision requiring the owner to load and unload carload shipments was discussed and construed. The shipper shipped steel beams interstate under the above tariff consigned to one Rogers. The plaintiff contracted with Rogers to load the beams and the plaintiff took advantage of the use of a crane and crane operator furnished by the defendant carrier to help unload the beams. While so unloading, the plaintiff was injured through the alleged negligence of

the crane operator, and the plaintiff sued the defendant carrier. The trial court held as a matter of law the crane operator was at such time an employee of the defendant carrier and that the defendant was liable for its negligence, if any. Upon appeal the defendant called attention to the Appellate Court of the tariff requiring the shipper to load and unload carload shipments. The Appellate Court reversed the case and based its decision squarely on the Interstate Commerce Commission Tariff Regulation. The court, in its opinion stated, as follows:

> "The contract for carriage of an interstate carrier must be in accord with the rules and regulations governing interstate commerce * * *. *The tariff and schedules filed with the Interstate Commerce Commission become a part of the contract, and as such binding on the parties* * * *. In order to prevent discrimination the law has provided that certain things shall be done in all shipments. Neither the shipper nor the carrier can deviate from them without discrimination, which is the important thing inhibited * * *. Thus, in the instant case, the contract between the shipper and carrier places the obligation of unloading the carload lots upon the shipper or consignee. Had the parties contracted that the carrier without additional charge should unload the shipment, it would have been a violation of Interstate Commerce Regulations and subjected them to the penalty provided. Thus, as a matter of law, as well as a matter of fact, in this interstate shipment, the duty of unloading devolved solely upon the consignee. When plaintiff contracted to truck these I-beams from the place of delivery by the carrier to a bridge site, he stepped into the place of a consignee who was charged with the duty of unloading * * *. While in no way obligated to do so, in the instant case, the defendant had provided a crane, the use of which together with an operator was tendered to shippers to aid them in unloading heavy

articles. To hold that the defendant railway company in so doing was discharging a part of its duty, or its contract as a carrier would be to hold that it was acting in violation of Interstate Commerce Regulations. The record in this case will not sustain a conclusion that the carrier contracted to unload this shipment. Instead, in the face of the Interstate Regulations, the only justifiable conclusion is that the defendant carrier loaned this unloading device and its employee in operating the same to the consignee in whose place plaintiff was acting in receiving a shipment * * *. In another decision involving an interstate carload shipment it was recently held: 'Upon delivery of the car at the usual place of delivery of carload shipments of livestock, it was the duty of the plaintiff to take charge of them, unload and look after them; and such assistance in unloading and looking after them as may have been rendered by the employees of the delivering carrier was purely voluntary, and such employee while so engaged was the agent of the owner, and not of the railroad'."

Applying the reasoning set forth by the Michigan Supreme Court in the above suit, the Bryan Compress and Warehouse Company in agreeing to load the cotton was acting as agent for the shipper and until the cotton had actually been loaded no delivery was complete to the carrier.

American Railway Express Company v. American Trust Company, 47 Fed. 2d 16, is another leading case construing the effect of a similar interstate tariff. It is authority for carrier's position that delivery was not complete even though the parties so considered it a completed delivery. In that case the shipper, American Trust Company, had the railway express company to pick up for shipment currency and silver coin. The express company's

wagon came to the trust company's office and took the shipment and put it in an iron safe in the express company wagon, and while on the way to the express company's office the wagon was held up and robbed. The trust company sued the express company to recover for its loss and judgment was rendered in its favor in the trial court. There was a tariff involved which provided that packages containing money, bonds, or other securities would be received for transportation only when delivered at the express company's office by the shipper. The tariff further provided that in case of shipment of coin or bullion too heavy to be carried by hand the express company's wagon would call for the shipment, but in such case it was required that a representative of the shipper accompany and retain custody of the shipment until delivered at the express company's office. Thus, by direct and unequivocal terms the tariff provided that in no case would delivery of such shipments be accepted by the express company at any place other than its office. The trial court found that the express company had never enforced the provisions of the tariff in South Bend, Indiana, but on the contrary, had a uniform custom of taking custody of money shipments at the shipper's place of business. The shipper contended that the tariff provision with respect to place of delivery was a provision which could be waived by the express company. The Circuit Court of Appeals first held that the evidence did not support the court's finding with respect to the alleged custom. This was sufficient to dispose of the case but the court went further and held that even if the custom had been proved, it could not take

precedence over the tariff provision. The court, in its opinion, found that no receipt was given for the money until the money was delivered by the express company truck to the express office. The court, in its opinion, stated:

> "But if the evidence showed that both appellant's agent and the bank understood that the legal possession of the money passed to the carrier at the bank, and if we further assume that a receipt was given therefor by appellant's driver at the bank door, these facts would not, under the decisions, affect appellant's liability. For *the published tariff may not be avoided, enlarged, or varied by the shipper and the carrier through express or implied contract.* The decisions are clear and explicit. Such tariffs, at least those which are factors in determining the carrier's charges, have the force and effect of statutes * * *. The paramount requirement that tariff provisions be strictly adhered to, so that shippers may receive equal treatment, presents an insuperable obstacle to recovery. The judgment is reversed, and the cause remanded, with direction to dismiss the action."

As in the preceding cases, we have a specific statute tariff providing that it is the shipper's duty to load the cotton into the carrier's car. It is admitted that the cotton had not been loaded at the time of the fire. It is further admitted that it was the established practice for the compress company to load the cotton into the cars for and on behalf of the shipper and at the shipper's expense. Construing the facts in light of the tariff involved, one is forced to the conclusion that the cotton, while still on the compress platform, had not been delivered to the railway company in spite of the fact that the bill of lading had been issued. That there was still the duty on the part

of the shipper or his agent to load the cotton into the car before delivery was complete to the carrier, and since delivery was not complete to carrier, the carrier cannot be charged with the loss of the cotton prior to delivery to it.

The Court of Civil Appeals clearly erred in stating that it was the contemplation of the parties that delivery had been completed to the carrier when the bills of lading were issued as the tariff clearly placed the duty of loading on the shipper and no understanding, agreement, or custom of the parties could change the effect of the tariff.

COURT'S OPINION IGNORES TARIFF

The Court of Civil Appeals in its opinion cites the interstate tariff which places the duty of loading the cotton on the shipper and thereafter *completely ignores the effect of the tariff* in arriving at its erroneous conclusion that the delivery of the cotton was completed to the carrier at the time of the fire. None of the cases cited in the Court's opinion involved a tariff requiring the shipper to load, and all of them involved factual situations where there was either an actual agreement between the shipper and carrier or a prevailing custom whereby the carrier accepted the goods at some other place than in its box cars. A casual examination of these cases will reveal that delivery *would not be held to be complete* if there was a further act to be done on the part of the shipper. If there was no applicable statute or tariff to the contrary the shipper and carrier could agree to accept delivery at such place as they saw fit providing there was no further act to be per-

formed by the shipper. Likewise there could be no doubt that when the statute or tariff provides that some further act shall be done by the shipper that the carrier and shipper cannot by agreement, or otherwise, alter or vary the terms and conditions of such tariff or statute.

The Compress Company being the shipper's agent was responsible for the cotton until it was loaded into carrier's box cars and any remedy the shipper had for the loss of its cotton would be against the Compress Company and not against the carrier.

CONCLUSION

For the foregoing reasons and on the basis of its argument and supporting brief, a writ of certiorari should be granted.

Respectfully submitted,

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